IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No. 345 of 2007
With
COMPANY APPLICATION No. 346 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SNL FINANCIAL (INDIA) PVT. LTD - Applicant(s)
Versus
. - Respondent(s)

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Appearance :
M/S WADIA GHANDY &CO for Applicant(s) : 1,
None for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 26/09/2007

COMMON ORAL JUDGMENT

1. In both the present applications prayer made by the applicant company is for dispensation of the

meeting of the equity shareholders, secured creditors and unsecured creditors for consideration of the scheme of amalgamation between both the companies namely Time Plaza Organizers Pvt. Ltd., which is transferor company and SNL Financial (India) Pvt. Ltd., which is transferee company.

2. Scheme is produced at Annexure (E) and perusal thereof shows the appointed date mentioned at clause No. 1.2 is as 10th April, 2006, which would fall in the period of accounting year 2006-2007. It is not in dispute that the accounting year for all purpose including Income Tax Act and other relevant Act of taxing statute is over on 31st March 2007. It deserves to be recorded that Board of Director of both the applicant companies has approved the scheme by passing resolution on 28th April, 2007 so far as it relates to the transferor company and 19th July, 2007 so far as it relates to the transferee company. Therefore, when the Board of Director has approved the scheme admittedly accounting year of 2006-2007 was over. The

scheme up to 31st March 2007, at the most can be said as either not in existence or was only the draft scheme and the approval is granted by Board of Director of the applicant company after the new accounting year of 2007-2008 has started.

3. In view of the above, it prima facie appears to the Court that there is no valid justification on the part of the Board of Director of both the applicant company to back date scheme of amalgamation with effect from 10th April, 2006, which may result into altering not only the status of the company during the accounting year of 2006-2007 but it may also result into further finalization consequences including that under the Income Tax Act and other taxing statutes. In normal circumstances, had it been the case where the time is consumed on account of the pendency of the proceedings before this Court, then it may stand on different footing but pertinent aspect is that the Board of Director of the applicant company for the first time considered and approved the scheme in April 2007, and in

any case after expiry of the accounting period of 2006-2007.

4. Learned Counsel for the applicant upon the inquiry from his client has maintained the date as that of 10th April 2006, and justification as sought to be canvassed is that on 10th April 2006 the transferee company acquired all shares of the transferor company and had become wholly subsidiary of the transferee company and therefore, the date of 10th April 2006 is mentioned.

5. Prima facie it appears to the Court that merely because the shares were acquired by transferee company on particular date or that transferor company had become subsidiary of the transferee company is not the only relevant circumstance for testing the fairness of the scheme or to meet with the consideration that the scheme is not opposed to public policy. After the scheme is considered and approved by the company itself within same accounting year, possibly there may be justification. However, if the accounting year is changed and the statutory consequences

including under the fiscal law have fallen, there would not be any prima facie justification to nullify the effect of all taxing statute because they become subsidiary or that the transferee Company acquired shares of the transferor company.

6. Mr. Mahapatra learned Counsel for the applicant contended that this Court has power to alter the date under Section 392 of the Companies Act (hereinafter referred as to the 'Act') only when the matter comes up for consideration at the time of granting sanction to the scheme and he submits that the present stage is under Section 391 of the Act, for convening the meeting of the shareholders, secured creditors and unsecured creditors for consideration of the scheme. He further submitted that since consent of all the equity shareholders, secured creditors and unsecured creditors are obtained, present application is preferred for dispensation of requisite meeting under section 391 of the Act, for consideration of the scheme.

7. Learned Counsel for the applicant submitted that

in case if this Court is not inclined to dispense with the meeting, liberty may be reserved to the applicant to move appropriate application for holding the meeting.

8. Learned Counsel for the applicant also relied upon the decision in case of **Mansukhlal vs. M.V. Shah, Official Liquidator reported at 1976 GLR page 592** and more particularly the observation made at para 8 and another decision of the Apex Court in the case of **Miheer H. Mafatlal vs. Mafatlal Industries Ltd., reported at AIR 1997 SC page 506** and more particularly observation made at para 27 in the said decision.

9. In case of Mansukhlal (supra) it was inter alia observed by this Court at para 8 as under:

"8. <u>In convening meeting, the Court has to be careful and keep a watchful eye to see that those who are asked to attend a given meeting have a like interest.</u> In other words, there cannot be a composite meeting of persons having conflicting interests. While convening a meeting of the creditors, it is to be classwise: such as secured creditors, unsecured creditors, creditors having a specified claim or a specified class of creditors or members would deliberate upon the scheme offered for its

consideration and by a process of democratic voting express an opinion whether they approve or do not approve." (Emphasis supplied)

10. In case of Miheer H. Mafatlal (supra) the Apex Court in the very paragraph at para 27 inter alia observed as under:

> "27. On a conjoint reading of the relevant provisions of Sections 391 and 393 it becomes at once clear that the Company Court which is called upon to sanction such a scheme has not merely to go by the ipse dixit of the majority of the shareholders or creditors or their respective classes who might have voted in favour of the scheme by requisite majority but the Court has to consider the pros and cons of the scheme with a view to finding out whether the scheme is fair, just and reasonable and is not contrary to any provisions of law and it does not violate any public policy. This is implicit in the very concept of compromise or arrangement which is required to receive the imprimatur of a Court of law. No Court of law would ever countenance any scheme of compromise or arrangement arrived at between the parties and which might be supported by the requisite majority if the Court finds that it is an unconscionable or an illegal scheme or is otherwise unfair or unjust to

> the class of shareholders or creditors for whom it is meant. Consequently it cannot be said that a Company Court before whom an application is moved for sanctioning such a scheme which might have got the requisite majority support of the creditors or members or any class of them for whom the scheme is mooted by the concerned company, has to act merely as a rubber stamp and must almost automatically put its seal of approval on such a scheme." (Emphasis supplied)

11. It is true that this Court may not exercise appellate power over commercial wisdom of the equity shareholders, however, at the same time as further observed by the Apex Court in the very decision of Miheer H. Mafatlal (supra) at para 28 that the Company Court's jurisdiction is peripheral and supervisory and not appellate. Even if aforesaid test is considered in view of the reasons recorded hereinabove, prima facie it appears to the Court that the scheme which is considered for the first time by the Board of Directors of the company on 28th April 2007 and 19th July 2007 as the case may be, cannot be backdated by giving effect of 10th April 2006,

more particularly when scheme is considered after an accounting year is over on 31th March 2007 and all statutory consequences including fiscal law like Income Tax etc. have fallen.

12. As the consent is obtained by the applicant company based on scheme providing the appointed date as that of 10th April 2006, and not any date after the commencement of the accounting year of 2007-2008, and if the meeting is dispensed with for consideration of the scheme, it may foreclose all time to consider the aspect for altering the date, if this Court at subsequent stage is to consider the matter for grant of sanction by altering the appointed date. Therefore, keeping in view the aforesaid circumstances, it is not the case for exercising discretion to dispense with the meeting of the equity shareholders, secured creditors or unsecured creditors as the case may be.

13. Had there has been the prayer for holding of the meeting, Court could have ordered for consideration of the scheme by equity shareholders, secured creditors and unsecured

creditors in both the ways, namely by keeping the appointed date as of 10th April 2006 or any date after the commencement of the accounting year of 2007-2008 say 1st April 2007, or such other date. As the only prayer is for dispensation of the meeting and keeping in view the aforesaid facts and circumstances and the reasons recorded hereinabove, the meeting of the shareholders, secured and unsecured creditors as prayed are not dispensed with.

14. However, it is clarified that the present order shall not operate as bar to the applicant company to move appropriate application for consideration of the scheme by altering the appointed date after the commencement of the accounting year 2007-2008 or with the same date, subject to the change as may be ordered by this Court in such application in view of the present order.

15. Both the Company Applications stand disposed of accordingly.

(JAYANT PATEL,J.)

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